IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE V.RAMKUMAR

MONDAY, THE 26TH FEBRUARY 2007 / 7TH PHALGUNA 1928

CRL.A.No. 2501 of 2006(B)

SC.5/2002 of ADDL. SESSIONS COURT (ADHOC)-II, KALPETTA

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APPELLANT:

V.P.VILASKUMAR,
CONVICT NO.3643, CENTRAL JAIL,
KANNUR.

BY ADV. ADV.C.T.JESTIN(STATE BRIEF)

RESPONDENTS:

THE STATE OF KERALA.

BY PUBLIC PROSECUTOR SRI.K.S. SIVAKUMAR

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 26-02-2007 , THE COURT ON 26/02/2007 DELIVERED THE FOLLOWING:

V. RAMKUMAR, J.

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Crl. Appeal No. 2501 of 2006 A

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Dated: 26-02-2007

JUDGMENT

In this appeal preferred from the Central Prison, Kannur, the appellant who was the sole accused in S.C. 5/02 on the file of the Addl. Sessions Judge (Adhoc) II, Kalpetta, challenges the conviction entered and the sentence passed against him for an offence punishable under Sec. 55 (a) of the Abkari Act.

2. The case of the prosecution is that on 12-6-2000 at about 4.15 p.m. at a place called Naikupa the accused was found transporting 30 packets each of 100 ml. of Karnataka arrack in a private bus bearing Reg. No. KL W-2333, and that the accused has thereby committed offences punishable under Secs. 8(1) and (2) and Sec. 55 (a) of the Abkari Act.

3. On the accused pleading not guilty to the charge framed against him for an offence punishable under Sec. 55(a) of the Abkari Act, the prosecution was permitted to adduce evidence in support of its case. The prosecution altogether examined 5 witnesses as P.Ws 1 to 5 and got marked 7 documents as Exts. P1 to P7 and 28 packets of allegedly

Karnataka arrack as M.O.1 series.

4. After the close of the prosecution evidence, the accused was questioned under Sec. 313 (1) (b) Cr.P.C. with regard to the incriminating circumstances appearing against him in the evidence for the prosecution. He denied those circumstances and maintained his innocence.

5. Since the Court below did not consider this a fit case for recording an order of acquittal under Sec. 232 Cr.P.C. the accused was, therefore, called upon to enter on his defence and to adduce any evidence which he might have in support there of. He did not adduce any defence evidence.

6. The learned Addl. Sessions Judge, after trial, as per judgment dated 12-07-2006 found the appellant guilty of the offence punishable under Sec. 55(a) of the Abkari Act and sentenced him to undergo simple imprisonment for 5 years and to pay a fine of Rs. 1,00,000/- and on default to pay the fine to undergo simple imprisonment for six months. It is the said judgment which is assailed in this appeal.

6. I heard Advocate Sri. C.T. Justine, the learned counsel who defended the appellant on State Brief and Advocate Sri. K. S. Sivakumar, the learned Public Prosecutor who defended the

State.

7. The only point which arises for consideration is as to whether the conviction entered and the sentence passed against the appellant are sustainable or not ?

THE POINT:-

8. P.W.1 is the Excise Preventive Officer, Sulthan Bathery who detected the offence, arrested the accused and effected the search and seizure of the packets allegedly containing contraband arrack. P.W.2 is the Excise guard who was accompanying P.W.1. P.Ws 3 and 4 are respectively the Driver and Conductor of the bus from which the packets were seized. Both of them turned hostile to the prosecution. P.W.5 is the Excise Inspector who conducted the investigation and laid the charge before court.

9. After an anxious re-appraisal of the oral and documentary evidence in the case and after hearing both sides, I am not satisfied that the prosecution has succeeded in establishing the guilt of the accused beyond reasonable doubt. Even if the testimony of P.Ws 1 and 2 to the effect that the accused along with 30 packets containing the alleged contraband liquor was arrested from the bus as alleged, can be

believed, the prosecution can succeed in bringing home the guilt of the accused only if the sample taken from the 30 packets in a tamper proof condition and which was eventually forwarded to the Chemical Examiner was on analysis found to contain Ethyl Alcohol of the requisite strength so as to conclude that it was illicit arrack. No doubt, Ext.P6 certificate of chemical analysis dated 17-08-2001 shows that the 200 ml. of sample on analysis was found to contain 35.04 percent by volume of Ethyl Alcochol.

10. Going by the testimony of P.W.1, the contents of two out of 30 packets were poured into a bottle containing 375 ml. and taken as sample after sealing the same. The detection, search and seizure were made on 12-6-2000. After sealing the sample bottle, P.W.1 claims to have seized the same under Ext.P2 seizure mahahzar prepared from the spot itself. Ext.P4 property list shows that the above sample along with the rest of the 28 packets were received in court only on 23-6-2000. They were received as T.R.295/00. There is absolutely no link evidence to show as to the date on which the sample was actually despatched to the Chemical Examiner. The Prosecution was rest content with Ext.P6 certificate of analysis to show that the sample containing 200 ml. despatched from the J.F.C.M., Sulthan

Bathery in C.R. No. 30/00 of Excise Range, Sulthan Bathery was analysed to find that it contained 35.04 percent by volume of Ethyl Alcohol. A perusal of Ext.P6 certificate of analysis shows that the sample was forwarded to the Chemical Examiner as per letter No. TR/295/2000, dated 22-6-2000. If the sample had reached the court only on 23-6-2000 and was received as T.R. 295/00 one fails to understand as to how on 22-6-2000 the J.F.C.M. , Sulthan Bathery could have forwarded the sample to the Chemical Examiner. What is more surprising is the fact that Ext.P5 forwarding note was filed by P.W.5 in court only on 25-8-2000. Ext.P6 certificate of analysis further shows that the sample in this case despatched along with the letter dated 22-6-2000 of J.F.C.M., Sulthan Bathery, was received in the Chemical Examiner's Laboratory at Kozhikode on 24-8-2000 which is the date on which P.W.5 had filed Ext.P5 forwarding note before Court. There was absolutely no attempt to explain away or reconcile the glaring discrepancies referred to above. When the sample admittedly reached the court only on 23-02-2000 it could not have been despatched by the Magistrate to the Chemical Examiner on 22-06-2000. Even if it was despatched only on the next day after receipt of sample an explanation is due as to why

it reached the chemical examiner only on 24-8-2006. There is absolutely no explanation forthcoming. Similarly, there is no contemporaneous record in the court of the committal Magistrate to indicate the date on which the sample was actually sent. No attempt was also made to examine the thondi section clerk concerned who had despatched the sample. The office copy of the covering letter of the Magistrate while forwarding the sample to the chemical examiner is also not seen retained, much less, marked as an exhibit. The conviction entered and the sentence passed by the learned Addl. Sessions Judge overlooking these glaring infirmities cannot, therefore, be sustained and are, accordingly, dislodged.

11. The appellant is found not guilty of the offence punishable under Sec. 55(a) of the Abkari Act and is acquitted thereunder. He is set at liberty. He shall be released from prison forthwith unless his continued detention is found necessary in connection with any other case against him.

In the result, this Criminal Appeal is allowed.

V. RAMKUMAR
(JUDGE)

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V. RAMKUMAR, J.

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Crl. Appeal No. 2501 of 2006 A

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Dated: 26-02-2007

JUDGMENT

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